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No. 1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

JOHN DAVID NORMAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JOHN DAVID NORMAN, Petitioner
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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

Petitioner John David Norman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 9, 1970.

OPINIONS BELOW

On November 3, 1969, the United States District Court for the Central District of California, entered an order, (App. A. p. A-1), finding the petitioner guilty of ten counts of mailing

advertisements of obscene articles and mailing obscene matter in violation of Title 18, United States Code, §1461. The District Court did not deliver a written opinion. The United States Court of Appeals for the Ninth Circuit affirmed the judgment, October 9, 1970, (App. B. p. B-1), without a written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 9, 1970. A timely petition for rehearing en banc was denied on October 28, 1970, (App. C. p. C-1), and this petition for certiorari was filed within thirty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Title 18 U.S.C. §1461, on its face, and as construed and applied, violates the free speech and press provisions of the First Amendment to the United States Constitution.

2. Whether petitioner's conduct was

a violation of Title 18 U.S.C. §1461 under the logical extension of the Supreme Court's decision in Stanley v. Georgia, 394 U.S. 557 (1969), and Rowan v. United States Post Office Department, et al., No. 399, October term 1969, decided May 4, 1970.

3. Whether petitioner's conduct was a violation of Title 18 U.S.C. §1461 under the logical extension of the Supreme Court's decision in Redrup v. New York, 386 U.S. 767 (1967).

4. Whether petitioner can be charged with knowledge of what constitutes obscene matter, in light of the constant changes in community standards and the divergence in courts' decisions as to whether particular material is or is not obscene.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 28

Section 1461: Mailing advertisement of obscene article and mailing obscene matter:

> "Every obscene, lewd, lascivious, or filthy book, pamplet, picture, paper, letter, writing, print,

or other publication of an indecent character; and ---

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what

means conception may be prevented or abortion produced, whether sealed or unsealed; and

"Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing ---

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything

declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination. June 25, 1948, c. 645, 62 Stat. 768."

STATEMENT OF THE CASE

Petitioner mailed, unsolicited, to names on various mailing lists, purchased from other companies, notices of material available, advertising matter and order blanks for magazines and photographs. All such matter was designed to appeal to homosexuals. Some order blanks included a statement to be made by the would-be purchaser to the effect that he was over 21 years of age. Only unsolicited mailings

of this nature are involved in the first 5 counts of the indictment against petitioner filed March 30, 1969.

The second 5 counts of the indictment (10 counts in all) involved advertisements and notices as described above, pamphlets, photographs and a catalog, all solicited in writing, with prepayment of the cost by either Los Angeles Police Officers or United States Postal Inspectors under assumed names, using post office boxes for their addresses.

The pamphlet was entitled Teen-Age Masturbation, a short text and pictures of nude males, with their genitals exposed. The six photographs listed in one count of the second five of the indictment are of two nude males in bodily contact with their genitals exposed. The catalog illustrated pictures of nude males with their genitals exposed, advertised the pamphlet Teen-Age Masturbation, and offered 3 magazines for sale.

The government and petitioner stipulated that the material in the first 5 counts was unsolicited; that the material in the second five counts was solicited

by either Los Angeles Police Officers or United States Postal Inspectors, soliciting catalogs, photographs and pamphlets under assumed names; that the items mentioned in each of the ten counts were placed in the mail by the defendant and received by the intended recipient.

The matter went to trial October 10, 1969, on the petitioner's plea of NOT GUILTY, and petitioner was found guilty by the Court on all 10 counts on November 3, 1969.

REASONS FOR GRANTING THE WRIT

1. THIS PETITION PRESENTS QUESTIONS SUBSTANTIALLY SIMILAR TO AND IDENTICAL WITH ISSUES ALREADY PENDING BEFORE THIS COURT IN UNITED STATES V. NORMAN GEORGE REIDEL, NO. 534, OCTOBER TERM 1970.

Norman George Reidel was charged in the United States District Court for the Central District of California with three counts of knowingly depositing for mailing and delivery in the Post Office of the

United States, pamphlets addressed to various individuals, which pamphlets were obscene, indecent, lascivious and filthy. The pamphlet in question was entitled, "The True Facts about Imported Pornography" and purported to relate the imported pornography situation, with photographs of various individuals engaging in sexual activities or about to engage in such sexual activities.

The strong similarities of petitioner's case and identical issues of petitioner's case to the Reidel case justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND APPELLATE AND DISTRICT COURTS AS TO THE VALIDITY AND PROPER INTERPRETATION OF TITLE 18 U.S.C. §1461 DEFINITION OF OBSCENITY AND THE PROTECTION AFFORDED BY THE FIRST AMENDMENT.

Roth v. United States, 354 U.S. 476, and A Book, etc. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, both held that three tests must coalesce in order to make a judgment of obscenity, namely, (a) the dominant theme of the material must appeal to a prurient interest, (b) it must affront contemporary community standards, (c) it is utterly without redeeming social value.

Differing standards set by this Court in Redrup v. State of New York, 386 U.S. 767, held the test to be (a) was the offensive material aimed at juveniles, (b) was there an assault upon an individual's privacy so as to make it impossible for an unwilling individual to avoid exposure, and (c) was there any "pandering"

within the meaning of Ginzberg v. United States, 383 U.S. 463.

The court, in United States v. Watson (D.C. Mo. 1968), 293 F.Supp.694, said that,

> "When Justice Brennan used the word 'pandering' in the Ginzberg case, he was simply using a shorter description than that used by the Chief Justice to describe the business in which the Roth defendants were engaged . . . We cannot believe that what the Supreme Court said about 'pandering' in Ginzberg is to be construed as a legislative amendment to Sec. 1461."

This Court, in Stanley v. Georgia (1969), 394 U.S. 559, held that mere private possession of obscene material in one's home is protected under the First Amendment to the United States Constitution. As a logical extension of that decision, the Honorable Thomas J. McBride, of the United States District Court, Eastern District of California, in the case of United States v. Robert Irving Lethe, dba Athena Books (1970), 312 F.Supp. 421, held

this must imply the right to buy or to receive obscene material, or the right to possess is of no value, and, further, the right to buy or receive is meaningless unless someone has the right to sell or to send.

The court in United States v. John Sherrin Langford, 315 F.Supp. 472, ordered the defendant released under the provisions of 28 U.S.C. §2255, because of the uncertainties concerning the laws on obscenity.

On May 4, 1970, this Court decided Rowan v. The United States Post Office Department, et al., No. 399, October Term 1969, holding that the householder is the absolute master of what publications do or do not come into his house. The statute was interpreted as removing all discretion from the Post Office Department to determine what should or should not enter a person's home, the court stating, "It would impose the Postmaster General between the sender and addressee and, at the least, create the appearance, if not the substance, of governmental censorship." (Slip Opinion p. 7).

This Court itself has been unable to

agree upon the constitutional definitions of obscenity. In Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, Justice Harlan remarked in a dissent, "In thirteen obscenity cases from the date Roth was decided in which signed opinions were written, there has been a total of fifty-five separate opinions."

Research shows that the First Amendment aspects of transmitting similar matter through the mails has been brought to the court's attention almost ad infinitum. But the philosophy of the First Amendment requires that its guarantees not be restricted by those who find the dissemination of certain material unpleasant, undesirable or even abhorrent.

The conflicts and uncertainties, and the necessity of guaranteeing under the First Amendment the expression of unusual, different, unconventional ideas that are not shared by the majority, justify the grant of certiorari to review the judgment below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
MARGERY LOWENSTEIN
Counsel for Petitioner

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. 4357-Criminal
Date November 3, 1969

DOCKET ENTRY: Ent procs fur court trial (3rd day) Cnsl argue the case. Ent ord finding deft. guilty as chgd in cts 1 thru 10, inclusive. Ord ref to P/S for I&R contd to 11-24-69-9 :30AM for sentence. Deft ord be present. (Issd abstract P/O.) (EC).

PRESENT: HON. E. AVERY CRARY, JUDGE

Wayne E. Payne — Deputy Clerk
Betty McClung — Court Reporter

Michael Lightfoot
Asst. U.S.Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW)

(1) John David Norman

_x_ present ___custody x___bond ___O/R

. . .

ATTORNEYS FOR DEFENDANTS

(1) Al Matthews

_x_ present ___appointed _x_ retained

. . .

PROCEEDINGS: FURTHER COURT TRIAL: (3rd Day)

Defendant is present with counsel. Counsel each side make statement and argue the case to the Court.

Courtmakes statement and FINDS the defendant guilty as charged in Counts 1 through 10, inclusive.

Order this matter referred to the Probation Office for pre-sentence investigation and report and continued to 11-24-69-9:30 AM for sentence.

Defendant ordered to be present.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. JOHN DAVID NORMAN, Appellant.	No. 25701 ORDER OF AFFIRMANCE

Before: KOELSCH and ELY, Circuit Judges, and TAYLOR, District Judge.*

The judgment is affirmed.

FILED
OCT 9 1970
WM.B.LUCK, CLERK

M. Oliver Koelsch

Walter Ely

United States Circuit Judges

Fred M. Taylor

United States District Judge

*Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID NORMAN,) No. 25701
Appellant,)
v.)
UNITED STATES OF AMERICA,) O R D E R
Appellee.)

Before: KOELSCH and ELY, Circuit Judges, and TAYLOR, District Judge.*

The petition for rehearing is denied.

United States Circuit Judges

United States District Judge

*Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1018

JOHN DAVID NORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After waiving jury trial in the United States District Court for the Central District of California, petitioner was convicted on ten counts of mailing obscene materials in violation of 18 U.S.C. 1461. He was sentenced to concurrent prison terms of fifteen months subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed without opinion (Pet. App. B).

It is undisputed that the mailings for which petitioner was convicted were commercial rather than

private in nature. It was stipulated that five of the mailings were in response to solicitations in writing by postal inspectors or police acting under assumed names; the other five involved unsolicited mailings of advertisements for the materials ultimately purchased.

Petitioner contends that *Stanley* v. *Georgia*, 394 U.S. 557, and other decisions prohibit his prosecution and render 18 U.S.C. 1461 unconstitutional. The question whether *Stanley* or other intervening decisions have undermined *Roth* v. *United States*, 354 U.S. 476, sustaining a similar conviction under the same statute, is presently before the Court in *United States* v. *Reidel*, No. 534, this Term, probable jurisdiction noted, October 12, 1970. That case, however, involved only solicited mailings, in which the purchaser asserted himself to be an adult. As to half the counts here, on the other hand, neither apparent consent nor apparent majority was present. While the government argues in *Reidel* that the presence of such factors is not sufficient to shield commercial mailings from criminal sanction, the reasoning of the cases purporting to follow *Stanley* has consistently depended upon them. Thus, in *United States* v. *Lethe*, 312 F. Supp. 421 (E.D. Cal.), on which petitioner relies, the district court distinguished and sustained counts of the indictment relating to unsolicited mailings, as untouched by even the extended view of *Stanley*. *Id.* at 426. Half of the counts on which petitioner was convicted here are similarly unaffected.

In view of the five counts which may be affected by this Court's decision in *Reidel*, however, the Court may wish to defer disposition of the present petition until the final disposition of that case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 412690 422